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U. S. DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
NOV 26 2001

Civil Action No. 2-01CV-198 TJW  
Deputy

## Jury Demanded

Plaintiff Bid/Ask, L.L.C. (“Bid/Ask”) files this its Response to Defendants’ Motion to Transfer Venue to the Southern District of Texas. Defendants’ motion fails to portray accurately the relationship between this patent infringement action and the United States District Court for the Eastern District of Texas. Contrary to Defendants’ allegations, this case has a significant factual relationship to this judicial district. In addition, Defendants have fallen far short of their burden to demonstrate that the balance of convenience and justice *clearly* weighs in favor of transfer. Accordingly, Plaintiff’s choice of forum should not be disturbed.

**A. The Importance of Commodities to the Eastern District.**

As this Court well knows, the Eastern District is home to many of the largest commodity producers in the country, if not the world. Indeed, thousands of people within the Eastern District are employed in the utilities, forestry, and mining industries,<sup>1</sup> which produce millions of

<sup>1</sup> See Declaration of Michael S. Perez (“Perez Decl.”), Exhs. A-RR.

dollars of electricity,<sup>2</sup> lumber,<sup>3</sup> oil and gas,<sup>4</sup> and coal<sup>5</sup> annually. Undoubtedly, the fate of many other entities is tied to the ever-changing demand for these commodities.

**B. Enron's Electronic Commodities Trading Exchange -- EnronOnline.**

In 1999, Defendants Enron Corp. and EnronOnline, L.L.C. (collectively "Enron") set up an interactive web site called "EnronOnline" for trading "energy related products and other commodities such as gas, power, oil and refined products, plastics, petrochemicals, credit derivatives and/or steel."<sup>6</sup> Upon entering Enron's website, actual and prospective users are

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<sup>2</sup> See Perez Decl., Exh. SS. This exhibit shows that in 1999, several electric utilities were already well-established in the Eastern District (including, but not limited to, Bowie City, the Bowie-Cass Electric Coop., Inc., Cherokee County Electric Coop. Ass'n, City of Denton, Denton County Electric Coop., Inc., Fannin County Electric Coop., Grayson-Collin Electric Coop., Inc., Houston County Electric Coop., Inc., Jasper City, Jasper-Newton Electric Coop., Inc., Lamar County Electric Coop. Ass'n, Liberty City, Newton City, Panola-Harrison Electric Coop., Inc. Rusk County Electric Coop., Inc., San Augustine City, and Upshur Rural Electric Coop. Corp.), and these utilities were servicing thousands of customers and earning millions of dollars in revenue annually.

<sup>3</sup> See Perez Decl., Exh. TT. This exhibit shows that as far back as 1995, timber represented Texas's third most valuable agricultural commodity (exceeding \$1 billion in delivered value) and represented more than 1/3 of East Texas's agricultural income. Indeed, by July of 2000, 38 counties in East Texas were harvesting \$1,000,000 or more of lumber, and five of the state's six largest timber producing counties were located in the Eastern District (namely, Polk, Angelina, Tyler, Jasper, and Newton counties). See Perez Decl., Exh. UU. Even today, "[t]he inland pines still supply a lumbering industry," with "Huntsville, Lufkin, and Nacogdoches [being] important lumber towns." See Perez Decl., Exh. VV.

<sup>4</sup> See Perez Decl., Exhs. WW-YY. These exhibits show that oil and gas production within the Eastern District yields millions of dollars in revenue annually. Indeed, as noted in The Columbia Encyclopedia, "[t]he real wealth of East Texas . . . comes from its immense, rich oil fields." See Perez Decl., Exh. VV.

<sup>5</sup> See Perez Decl., Exhs. ZZ-DDD. Exhibit AAA discusses that in 1999, the state's largest coal producer mined 28.6 million tons of lignite from five different counties, three of which are in the Eastern District. This production represents over \$460,000,000 in revenue (assuming an average heating content of 6,000 Btu/lb and based on 1999 prices). See Perez Decl., Exhs. BBB-DDD.

<sup>6</sup> Declaration of Brad Richter in support of Defendants' Motion to Transfer Venue, dated November 2, 2001; see also Perez Decl., Exh. EEE.

enticed by the following greeting:

Welcome to EnronOnline, the world's largest e-commerce Website for global commodity transactions. **If your business depends on commodities,** EnronOnline gives you real-time transaction tools and information to succeed in today's fast moving markets.<sup>7</sup>

Prospective users are then encouraged to "Register Today" by clicking on a hyperlink.<sup>8</sup> That link further informs prospective users that "EnronOnline registration is open to all companies that engage in wholesale commodities transactions for their own account."<sup>9</sup> To register, however, users must agree to the terms of Enron's license agreement.<sup>10</sup>

By any measure, Enron has been successful in its EnronOnline commodities trading business. As of October 29, 2001, according to Enron, over 1,600,000 commodities were traded over EnronOnline having a notional value of more than "\$880 billion."<sup>11</sup> Forester Research predicts that online energy trading alone will "explode from a \$400 billion market last year to \$3.6 trillion in 2005. And Enron leads the field, with double the online trading volume of its nearest competitor."<sup>12</sup> While only discovery will tell, undoubtedly, many of these commodities either have or will be created,<sup>13</sup> transported,<sup>14</sup> or offered for sale<sup>15</sup> within this district. Given

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<sup>7</sup> See Perez Decl., Exh. FFF (emphasis added).

<sup>8</sup> See Perez Decl., Exh. GGG.

<sup>9</sup> *Id.*

<sup>10</sup> See Perez Decl., Exh. LLL.

<sup>11</sup> See Perez Decl., Exh. HHH.

<sup>12</sup> See Perez Decl., Exh. III.

<sup>13</sup> See notes 1-5, *supra*.

<sup>14</sup> See Perez Decl., Exh. JJJ.

<sup>15</sup> See <http://www.enrononline.com>

EnronOnline's "lion's share" of these transactions, many of these commodities will be bought or sold via EnronOnline, with an Enron trader on one end or the other.

**C. Plaintiff's Patent Covers EnronOnline Itself.**

On September 17, 2001, Bid/Ask filed this action for patent infringement against Enron seeking damages and an injunction preventing Enron from infringing Bid/Ask's United States Patent No. 6,058,379 ("the '379 patent"). (Plaintiff's Original Complaint ¶¶ 6, 11). The asserted patent is entitled "Real-Time Network Exchange with Seller Specified Exchange Parameters and Interactive Seller Participation." The '379 patent claims, among other things, "a computer system for networked exchange of a commodity between a seller and a purchaser." (Complaint, Attachment A, col. 15, line 30 et seq.) Bid/Ask alleges that Enron is infringing the '379 patent by, *inter alia*, "operating, making, using, offering for sale, and/or selling EnronOnline."<sup>16</sup>

**D. Procedural Posture of This Case.**

After granting Enron a three-week extension, Enron answered Bid/Ask's complaint. In its Answer, while denying infringement, Enron concedes that it resides in this district (for purposes of establishing personal jurisdiction) and that venue is therefore proper in this forum.<sup>17</sup> Nevertheless, Enron has moved to transfer this case under 28 U.S.C. § 1404(a) from the Eastern District to the Houston Division of the Southern District of Texas on the grounds that the transfer would promote the "convenience of the parties" and would be in the "interest of justice." Enron's motion fails to come forward with sufficient evidence of inconvenience, however, to justify depriving Plaintiff of its chosen forum.

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<sup>16</sup> Plaintiff's Original Complaint at ¶ 11 (emphasis added).

<sup>17</sup> Answer and Counterclaim of Enron Corp. and EnronOnline, L.L.C. at ¶ 9 ("Defendants do not contest the propriety of venue under 28 U.S.C. §§ 1391 and 1400(b).").

## II. DISCUSSION

Before an action may be transferred to another federal forum pursuant to 28 U.S.C. §1404(a), two factors must be met: “(1) the proposed transferee district must be one in which the action might have been brought originally, and (2) the court must determine that transfer of the action will enhance the convenience of the parties and witnesses, and [be] in the interest of justice.” *Gajeske v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 6101, \*9 (E.D. Texas, April 5, 2000).<sup>18</sup> The burden is on the moving party to demonstrate why the forum should be changed. *Id.* This burden is a strong one and requires the movant to prove that the balance of factors *clearly* weighs in favor of such transfer. *Id.*; *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 768 (E.D. Tex. 2000) (“[T]o prevail, the litigant must demonstrate that the balance of convenience and justice **substantially** weighs in favor of transfer.” (emphasis in original)). Ultimately, though, the decision to transfer venue under Section 1404(a) is within the trial court’s sound discretion. *Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*10. For reasons presented below, Defendants have utterly failed to satisfy this burden.

### A. Convenience Factors

The specific “convenience” factors that must be considered by the court include: (1) the plaintiff’s choice of forum; (2) the convenience of the parties; (3) the convenience of witnesses; (4) the relative ease of access to the sources of proof; (5) the availability of compulsory process for attendance of unwilling witnesses; (6) the cost of obtaining attendance of witnesses and other trial expenses; (7) the place of the alleged wrong; (8) the possibility of delay and prejudice if transfer is granted; and (9) the location of counsel. *Id.* Defendants come forward with scant

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<sup>18</sup> In patent cases, the Federal Circuit views a district court’s ruling on a motion to transfer under Section 1404(a) as a “procedural matter.” *Mohamed*, 90 F. Supp. 2d at 770 n.14 (quoting *Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1352 (Fed. Cir. 2000)). Consequently, motions to transfer are governed by “the law of the regional circuit in which it sits.” *Id.* (quoting *Winner Int’l*, 202 F.3d at 1352).

evidence of inconvenience to support this motion. The only evidence that Enron (a billion dollar company<sup>19</sup>) can muster is two brief declarations: (1) Declaration of Kate B. Cole; and (2) Declaration of Brad Richter. The first does no more than establish the corporate structure of Enron, all of which Bid/Ask alleged in its Complaint. The second provides some facts relating to convenience factors, but as demonstrated below, falls far short of the evidence necessary to prove that the balance of factors *clearly* weighs in favor of transfer. *Id.* at \*9; *Mohamed*, 90 F. Supp. 2d at 768.

### **1. Plaintiff's Choice of Forum**

Enron argues in this case that Bid/Ask's choice of forum should be given "minimal," if any, deference because the case has no connection to the Eastern District. Enron is wrong on the law and the facts.

Federal courts in Texas consistently have recognized that a plaintiff's right to choose a forum is well-established, and that choice is entitled to great deference. *See Mohamed*, 90 F. Supp. 2d at 774 ("In this Court, deference to the plaintiff's choice of forum never 'disappears' under any circumstances."); *Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*12 ("Generally, a plaintiff's right to choose a forum is well-established and his choice is usually highly esteemed."); *Red Star Co., Inc. v. AAI. Fostergrant, Inc.*, 1999 WL 721967, \*3 (N.D. Tex. September 15, 1999) ("In general, a court must exercise a strong presumption in favor of the plaintiff's choice of forum."); *Carlile v. Continental Airlines, Inc.*, 953 F. Supp. 169, 171 (S.D. Tex. 1997) (noting that plaintiff's choice of forum is "most influential and should rarely be disturbed unless the balance is strongly in defendant's favor.") (*quoting United Sonics, Inc. v. Shock*, 661 F. Supp. 681, 683 (W.D. Tex. 1986)). Enron's argument that the Court should

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<sup>19</sup> See Perez Decl., Exh. KKK ("Enron's net income for 2000 was \$979 million . . . .").

disregard Bid/Ask's choice of the Eastern District is contrary to this precedent. In this Court, the plaintiff's choice of forum remains "highly esteemed," in all cases. *Gajeske*, 2000 U.S. Dist. LEXIS 6101 at 773; *Mohamed*, 90 F. Supp. 2d at 774. Even assuming that this deference disappears, in certain cases, as discussed below in Section 7, this is not one of those cases.

## **2. Convenience of the Parties.**

"The starting point for analyzing the convenience of the parties is a consideration of their residences in relation to the district chosen by plaintiff and the proposed district." *Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*12-13. Assuming Enron's figures are correct, Bid/Ask's headquarters is approximately 300 miles from the courthouse in Marshall, and Enron's headquarters are approximately 225 miles away. On the other hand, Bid/Ask's headquarters would be approximately 380 miles away from the courthouse in Houston (according to Enron) while Enron's headquarters would be within walking distance to the Southern District. Hence, whereas the parties would have an equal burden if the case remains in this district, the balance would be dramatically shifted in Enron's favor if the case is transferred to the Southern District. Thus, this factor weighs against transfer. *See id.*

## **3. Convenience of Material Witnesses.**

Bid/Ask acknowledges, as it must, that it is the convenience of the witnesses that is the most important factor to be considered when deciding whether to transfer venue. *Red Star*, 1999 WL 721967 at \*2. Not all witnesses are considered equal, however, in the convenience calculus. "[I]t is the convenience of non-party witnesses, rather than that of [party] witnesses, . . . that is the more important factor and is accorded greater weight." *Id.* Moreover, to establish "inconvenience," the movant must make more than a general allegation that the key witnesses are inconveniently located. *Carona v. Falcon Services Co., Inc.*, 68 F. Supp. 2d 783,

785-86 (S.D. Tex. 1999). Instead, the movant must “specifically identify the key witnesses and outline the substance of their testimony.” *Id.* (citing *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825 (S.D. Tex. 1993).

When tested against the appropriate standard, Enron has failed to demonstrate that any witnesses (party or otherwise) will suffer any significant inconvenience. Enron has identified three potential witnesses allegedly involved in the development of EnronOnline. (Richter Dec. ¶ 5.) Two of those three witnesses reside in Houston. The third resides in London. (*Id.*) All three are apparently Enron employees (i.e., “party witnesses,” *Red Star*, 1999 WL 721967 at \*2), although this is unclear from Enron’s terse declaration. Despite the apparent availability of the first two (while Enron does identify their function), Enron fails to “outline the substance of their testimony.” *Carona*, 68 F. Supp. 2d at 785-86. Moreover, Enron fails to submit any evidence of how any of these witnesses will be inconvenienced by having the case remain in Marshall. While the London witness ostensibly will be inconvenienced, the same would be true if the case were moved to Houston. *See Mohamed*, 90 F.Supp.2d at 776 (noting that the burden on Defendant in reaching Marshall from California was essentially the same as reaching Dallas from California). Enron’s allegations of inconvenience are insufficient to carry its burden. *Carona*, 68 F. Supp. 2d at 785-86; *see also Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*9 (“The moving party must carry a strong burden to prove that the convenience factors clearly favor such a change.”)

#### **4. Relative Ease of Access to the Sources of Proof.**

“Typically, the accessibility and location of sources of proof should weigh only slightly in this Court’s transfer analysis, particularly since these factors have been given decreasing emphasis due to advances in copying technology and information storage.” *Mohamed*, 90

F.Supp.2d at 778. This is particularly true in this case, which will turn largely on electronic forms of proof such as source code and transactional records. While Enron does note that “[t]he documents related to the development, operation, and capabilities of EnronOnline are in Houston or London,” it fails to quantify those documents or explain how transferring this case will reduce the burden of producing these documents. Certainly, for the documents in London, Houston versus Marshall presents an equal burden. Therefore, this factor does not weigh in favor of transfer.

**5. Availability of Compulsory Process for Attendance of Unwilling Witnesses.**

Two of the three identified Enron witnesses are within the Court’s subpoena power. *See Mohamed*, 90 F.Supp.2d at 778. While the third, who resides in London, is not, he is not within the subpoena power of the Southern District either. Therefore, this factor also does not counsel in favor of transfer.

**6. Cost of Obtaining the Attendance of Witnesses and Other Trial Expenses.**

With respect to the cost of attendance, the cost of traveling from Houston to Marshall is minimal, particularly given Enron’s financial resources. Accordingly, this factor does not justify “strip[ping] a case from its roots.” *Id.*

**7. Place of the Alleged Wrong**

Throughout its Motion, Enron stresses that “no alleged infringing transactions have occurred [in this district],” and as a result, the case should be transferred to the Southern District of Texas. (Motion at 7.)<sup>20</sup> To the extent Enron is attempting to challenge venue under 28 U.S.C.

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<sup>20</sup> Indeed, Enron went so far as to submit a declaration to this effect. *See* Declaration of Brad Richter in support of Defendants’ Motion to Transfer Venue, dated November 2, 2001, ¶ 7.

§ 1400(b)<sup>21</sup> Enron's argument cannot stand because Enron has admitted that venue is proper in this judicial district.<sup>22</sup> To the extent Enron is attempting to argue that no "alleged wrong" has taken place in this district because "no Eastern District of Texas resident has used EnronOnline to purchase or sell commodities," its argument also fails.

Specifically, the claims of the '379 patent cover both an interactive website for trading commodities as well as the method of its use. It is not necessary for a resident of the Eastern District of Texas to have consummated a trade on EnronOnline for there to be an "act of infringement" in this district. *See Intel v. United States Int'l Trade Comm'n*, 946 F.2d 821, 832 (Fed. Cir. 1991) (accused device need only be capable of infringement for sale to constitute infringement). All that is required to establish infringement is that the allegedly infringing product (in this case, EnronOnline) be "made, used, sold, or *offered for sale*" in this district. *See* 35 U.S.C. § 271(a) (emphasis added). Because Enron offers potential customers the ability to license its product over the Internet,<sup>23</sup> Enron is committing acts of infringement in this district, even if transactions have not been "consummated" in this forum. *See Group One, Ltd. V. Hallmark Cards, Inc.*, 254 F.3d 1041, 1053 (Fed. Cir. 2001) (Lourie, J., additional remarks) (holding that an offer to license software "is tantamount to a sale" under the patent laws). Accordingly, this factor weighs against transfer. *See Mohamed*, 90 F. Supp. 2d at 776-77.

## **8. Possibility of Delay and Prejudice.**

This factor weighs heavily against transfer. Bid/Ask filed its Complaint over two months ago. If Enron's motion is granted, Bid/Ask's case will be transferred to a district in which, by

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<sup>21</sup> Section 1400(b) states, in pertinent part, that "[a] civil action for patent infringement may be brought in the judicial district . . . where the defendant has committed acts of infringement and has a regular and established place of business."

<sup>22</sup> *See* note 17 *supra*.

<sup>23</sup> *See* Perez Decl., Exh. LLL.

Enron's own admission, it "took an average of three months longer for a civil case to reach trial." (Motion at 9 (citing Federal Judicial Caseload Statistics, *available at* <http://www.uscourts.gov/cgi-bin/cmsd2000.pl>)). While judges in the Eastern District may have a greater caseload, according to these same statistics, the Court's mandatory disclosure rules and other procedural tools create greater efficiency than experienced in the Southern District. *See Gakeske*, 2000 U.S. Dist. LEXIS 6101 at \*167 ("To determine which district is more congested, relevant statistics are median months from filing to disposition in district, and median months from filing to trial.").

The availability of the Eastern District's mandatory disclosure obligations and other especially streamlined procedural tools for patent cases is particularly important in this case given the significant disparity between the parties. Bid/Ask is a small company formed by the inventors of the '379 patent to commercialize their technology. In contrast, Enron is a billion dollar empire.<sup>24</sup> Bid/Ask can ill afford to engage in costly, discovery disputes. Moreover, the Eastern District's "No Excuses" approach to initial disclosures significantly reduces the cost of discovery for plaintiffs such as Bid/Ask. L.R. CV-26(b)(4). Such procedural protection is not available in the Southern District. Bid/Ask should not be stripped of these procedural benefits absent a showing of substantial prejudice, which is wholly absent in this case.

## **9. Location of Counsel**

This factor also counsels against transfer. Bid/Ask has retained Mr. Samuel Baxter as its Attorney-in-Charge. (Complaint at p. 5.) Mr. Baxter's offices are located in Marshall, Texas. Contrary to Enron's allegations, Mr. Baxter is not just "local counsel." *See Carona*, 68 F. Supp. 2d at 788 ("Although this factor is entitled to the least consideration, the Court notes that it does

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<sup>24</sup> See note 19 *supra*.

‘give some weight to location of counsel if Plaintiff chooses local counsel to bring the suit.’”) In addition, Enron’s lead attorney who signed the Answer and Motion to Transfer, Mr. Bill Sims, is located in Dallas, along with Ms. Veronica Smith Lewis (who is listed as “Of Counsel” on Enron’s pleadings). (Motion at 11.) Because Bid/Ask’s lead trial counsel is located in this district and Enron’s lead trial counsel is located in Dallas, this factor weighs against transfer. *See Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*16 (noting that because Defendant’s counsel was closer to the original jurisdiction than the proposed jurisdiction, thereby weighing against transfer).

#### **B. Public Interest Factors**

The “public interest” factors that must be considered in the Court’s assessment of a motion to transfer under § 1404(a) include: (1) the relative backlog and other administrative difficulties in the two jurisdictions; (2) the fairness of placing the burdens of jury duty on the citizens of an unrelated forum; (3) the local interest in adjudicating local disputes; and (4) the appropriateness of having the case in a jurisdiction whose law will govern the dispute to avoid difficult problems in conflicts of laws. *See Gajeske*, 2000 U.S. Dist. LEXIS 6101 at \*11.

In general, none of the so-called “public interest factors” justify transferring this case to the Southern District given the relationship of Bid/Ask’s infringement allegations and this district. First, as discussed above, the Southern District takes an average of three months longer than the Eastern District for a civil case to reach trial. (*See* Motion at 9 (citing Federal Judicial Caseload Statistics, *available at* <http://www.uscourts.gov/cgi-bin/cmsd2000.pl>)). Although judges in the Eastern District may have a greater caseload, the statistics suggest that the Eastern District provides greater efficiency than experienced in the Southern District.

Moreover, because this case calls into question Enron's online commodity trading practices with respect to EnronOnline, the residents of the Eastern District—given their involvement in the commodities business—have a keen interest in knowing whether EnronOnline infringes Bid/Ask's '379 patent. *See Mohamed*, 90 F. Supp. 2d at 779-80 ("Simply put, residents of the Eastern District of Texas would be interested to know whether there are currently defective products offered for sale in the Eastern District of Texas."). As a result, this case creates a public interest in the Eastern District that justifies the potential burden imposed on this Court and the citizens who reside in this district. *Id.*

### **III. CONCLUSION**

Enron has failed to prove that depriving the Plaintiff of its chosen forum will *clearly* promote the convenience of the parties and the interest of justice. Accordingly, Bid/Ask respectfully requests that the Court deny Enron's motion to transfer.

Respectfully submitted,

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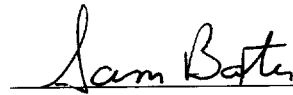
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**ATTORNEYS FOR PLAINTIFF  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Response to Defendants' Motion to Transfer Venue for Convenience and the Declaration of Michael S. Perez in Support of Plaintiff's Response to Defendants' Motion to Transfer Venue for Convenience has been served via first class mail on the following counsel of record on this 26th day of November, 2001:

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Exhibits  
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